No. 227.
Reply Brf. of Boynton for Appellee.

Supreme Court of the United States.

No. 227.
Filed April 16, 1902.

MARCELLUS A. LANDER, AS TREASURER OF CUYAHOGA COUNTY, OHIO, APPELLANT,

vs.

THE MERCANTILE NATIONAL BANK OF CLEVELAND, OHIO, APPELLEE.

REPLY TO SUPPLEMENTAL BRIEF OF APPELLANT.

Counsel for appellant, not taking issue with the matter contained in our additional brief by which we pointed out the utter irrelevancy to the question involved of most of the discussion in their original brief, now by a supplemental brief seek to escape the result following from the want of jurisdiction of the State Board of Equalization for banks to make the increase of valuation complained of, by the contention that a court of equity has no jurisdiction to grant relief from the board's illegal action although such jurisdiction is expressly conferred by statute; their contention being that section 167 of the Ohio Statute provides a plain, adequate and complete remedy at law. The argument used in support of this claim is the same even in its phraseology that was used in the case of *Black et al., Trustee*, vs. *Haggerty*, 60 O. S. 551, where the claimed effect of section 167 was repudiated by the Supreme Court of Ohio. By this section the state auditor is authorized to "remit such *taxes* and *penalties* thereon as he ascertains to have been illegally assessed, and such *penalties* as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation or to the levy or collection of taxes; and he may from time to time correct any error in any assessment of property for taxation or in the duplicate of taxes in any county." By this section the power of the state auditor over the subject is limited to the remission of taxes and penalties *illegally assessed* and to such *penalties*, not taxes, "as have accrued or may accrue in consequence of the negligence or error of any officer." There is not the slightest power or authority given to the state auditor to increase or diminish a valuation fixed by a Board of Equalization. Opposing counsel seem to have read this section of the Ohio Statute to

little effect if they deduce from it the power of the state auditor and his associates to remit "taxes," "in *any* amount that have accrued or may accrue in consequence of the error of any officer required to do any duty relating to the assessment of property for taxation" as stated (page 4) in their brief. Its language imports no such power. He may remit taxes *and* penalties for illegality. He may remit penalties *for negligence* or error of some officer not amounting to illegality. Power to make remission for such error is expressly confined to "penalties" and in no case reaches taxes which are merely erroneously assessed. In our case no penalties existed. By the proviso to the section, the auditor is authorized to remit in any one case an amount not exceeding one hundred dollars. Suppose the State Board of Equalization for banks had increased the valuation of the shares of some bank an even hundred dollars, is the state auditor empowered by this section to set aside such increase and annul the action of himself and two others constituting the Board of Equalization? He has the same power in all cases of alleged illegality where the sum does not exceed one hundred dollars, as he, the governor and attorney general, have in cases involving more than that amount. It requires but little reflection to show that this section confers no such power. The power of the Board of Equalization under section 2809 is to hear complaints and equalize values. Section 167 gives no power to hear complaints and review the action of the board, or to determine that the equalization was erroneous. Moreover, section 2808 provides for notice to the bank of the hearing by appointing the day therefor, in order that it may aid the process of equalization. Section 167 provides for no notice to any one of the action therein provided for. The power of the two tribunals derived from these two sections is essentially different. We are not without authority on the point.

In *Black* vs. *Haggerty*, 60 O. S. 551 it was held "that the power conferred by section 167 of the Ohio Statutes to remit taxes does not authorize the state auditor and his associates to reduce valuation made by a local board of equalization;" hence it is certainly true that the state auditor, governor and attorney general, in the exercise of the power conferred by section 167, cannot reverse and annul their action as a board of equalization for banks under sections 2808 and 2809. If they cannot reduce a valuation of a local board, *a fortiori*, can they not reduce a valuation of the state board of equalization for banks. Their power under sec. 167 is the same that it would be if other individuals composed the state board of equalization. If the contention of opposite counsel were true, no case could be prosecuted in the state of Ohio in its state courts to enjoin the collection of taxes illegally assessed, although expressly authorized by section 5848 of the Ohio statute. That section provides.

"Courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes and assessments, or the collection of either, and all actions to recover back such taxes or assessments as have been collected without regard to the amount thereof."

Section 5850 also provides:

"Actions to enjoin the collection of taxes and asessments must be brought against the officer whose duty it is to collect the same; actions to recover back taxes and assessments must be brought against the

officer who made the collection, or if he is dead, against his personal representative."

The construction of sec. 167, contended for by our adversary, would repeal and render these sections inoperative, although enacted long after section 167 was placed in the statute. If a shareholder in a bank would be required to invoke the power of the auditor and his associates under section 167 of the statutes in order to get rid of an illegal valuation of his property, every other taxpayer in the state would be required to resort to the same tribunal for like relief. Moreover, such a construction would demonstrate that every action brought to restrain the collection of taxes illegally assessed in Ohio for the last forty years had been illegally brought. The whole object of section 167 was to authorize the remission of taxes and penalties illegally assessed. It does not authorize the review of values fixed by the board of equalization. This was so stated in *Black* vs. *Haggerty*, supra, p. 559:

"While the auditor of state is vested with authority under section 167 to remit taxes and penalties illegally assessed, he is without authority to overrule the judgment of the local board in a case in which it might legally act."

But if the preposterous proposition were conceded, that section 167 authorizes a review of the action of the state board of equalization for banks, it would not defeat the jurisdiction of the courts conferred by section 5848 above recited. In *Haggerty* vs. *Huddleston*, 60 O. S. 149, the head note is as follows:

"The record of a board of equalization is not conclusive, but is only *prima facie* evidence in an action by a taxpayer under section 5848, Revised Statutes, challenging the legality of a tax or assessment."

In the opinion (page 165) the court say:

"All taxes and assessments in this state are levied and assessed by officers and boards subject to the test of legality by the courts, and when illegal they will be enjoined.....The right of the citizen to test the legality of a tax or assessment under section 5848 cannot be taken away by any record that can be made by a taxing office or board. The right is given to all to have final test as to the legality, in the courts, no matter what record may have been made by the taxing officers and boards.....The proceedings and record of the county auditor under sections 2781 and 2782 stand upon the same footing, and neither is conclusive when challenged in a proceeding under section 5848."

This case announces no new doctrine. The law has been as thus expressed for a half a century.

That federal courts will exercise the power and jurisdiction conferred by section 5848, has been repeatedly held. See *Grether* vs. *Wright*, 23 C. C. of App. 498; *Cummings* vs. *National Bank*, 101 U. S. 157. The remark made by the judge delivering the opinion in the Nichols case, so-called, 51 O. S. p. 515, was an inadvertent dictum. In order to meet the objection that the law under discussion was unconstitutional because it provided no appeal, it was suggested that the power vested in the state auditor by section 167, Revised Statutes, to correct errors of assessment, though not supplying a complete remedy, is not inapplicable to the procedure under the act of April 7, 1893; but giving to the statement its full force, it contains not the slightest intimation that the remedy to get rid of an illegal assessment, or the illegal levy of taxes, is

not as provided by section 5848 of the statutes. The proceeding in that case was under that section. Both the Circuit Court and the Circuit Court of Appeals held the jurisdiction was complete in the federal court to enjoin the collection of taxes assessed upon the illegal addition made in this case. In so holding they but followed the holding of this court in *Cummings* vs. *National Bank*, 101 U. S. 153, wherein it was contended that the federal courts would not enjoin the illegal levy of taxes, but would leave the parties to their remedy at law. This was an Ohio case and involved the question, whether the federal court would exercise the jurisdiction conferred by section 5848.

The court said (p. 157), "But the statute of the state expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Sec. 5848 of the Revised Statutes of Ohio, 1880; Vol. liii, Laws of Ohio, 178, sec. 1, 2. And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, where a statute of a state created a new right, or provided a new remedy, the federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. *Van Norden* vs. *Morton*, 99 U. S. 378. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute *is to be enforced*, and can only be appropriately enforced *on the equity side of the court*." This ruling is decisive of the question of jurisdiction."

In *Van Norden* vs. *Morton*, 99 U. S. 378, it was held:

"Where a statute grants a new right or a *new remedy* for the violation of an *old* right, or whenever such rights *and remedies* are dependent on the *state statutes* or on acts of Congress, the jurisdiction as between the law side and the equity side of the federal courts must be determined by the essential character of the case."

Here it is clearly implied that a remedy created by statute for the violation of either a new or an old right, and whether provided by a state statute or act of Congress, will be enforced by the federal court. Hence, to hold that section 167 prescribes the only tribunal before which parties must go to get rid of an illegal valuation of property for taxation, is to annul section 5848, and overturn repeated decisions of this court, and the entire practice in the State of Ohio in its relation to illegal taxation.

Respectfully submitted,

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Solicitor for Appellee.